



1-1-2005

# Right Back Where We Started From: The Last Twenty-Five Years of Groundwater Law in California

Eric L. Garner  
*Best, Best & Krieger*

Jill N. Willis  
*Best, Best & Krieger*

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

## Recommended Citation

Eric L. Garner & Jill N. Willis, *Right Back Where We Started From: The Last Twenty-Five Years of Groundwater Law in California*, 36  
McGEORGE L. REV. 413 (2005).  
Available at: <https://scholarlycommons.pacific.edu/mlr/vol36/iss2/8>

This Symposium is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact [mgibney@pacific.edu](mailto:mgibney@pacific.edu).

# Right Back Where We Started From: The Last Twenty-Five Years of Groundwater Law in California

Eric L. Garner\* and Jill N. Willis\*\*

*California's extensive and extremely valuable groundwater resources are not adequately protected. Except in a few areas, groundwater extraction is not managed to the extent that oil and gas production, timber harvesting, mining, or even surface water diversions are. California's groundwater is usually available to any pumper, public or private, who wants to extract it, regardless of the impact of extraction on neighboring groundwater pumpers or on the general community.<sup>1</sup>*

## I. INTRODUCTION

The emerging theme from the Governor's Commission to Review California Water Rights Law ("Commission") groundwater recommendations was one of efficiency coupled with long-term planning and effective management.<sup>2</sup> The Commission emphasized the need for a "strong policy of groundwater resources protection,"<sup>3</sup> with a focus on local control of groundwater management.<sup>4</sup> The Commission's recommendations reflected an opinion that local agencies were best equipped to manage groundwater resources, given the diverse and varying groundwater conditions throughout the state.<sup>5</sup>

The Commission also recommended several procedural and substantive changes to groundwater rights adjudications.<sup>6</sup> These recommendations were designed to facilitate the adjudicatory process and to "reduce the length and cost of adjudications."<sup>7</sup> The Commission felt that its recommendations would remove many of the roadblocks to effective management via adjudication.<sup>8</sup>

---

\* Eric L. Garner, an attorney at Best Best & Krieger, has been actively involved in litigation and administrative proceedings involving water rights, water quality, and endangered species issues. He has represented public and private clients in surface and groundwater adjudications involving the Mojave and Salinas rivers, Putah Creek, and the Santa Maria groundwater basin. He is also the co-author of California Water.

\*\* Jill N. Willis is an attorney at Best Best & Krieger where she specializes in water rights disputes and related issues. She represents numerous public and private clients in actions involving groundwater throughout Southern California and on the Central Coast.

1. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 136 (Dec. 1978) [hereinafter FINAL REPORT].

2. See *id.* at 165-69.

3. *Id.* at 166.

4. See *id.* at 145-46.

5. *Id.* at 166.

6. See *id.* at 237-50 (detailing the Commission's proposed legislation on groundwater rights adjudication).

7. *Id.* at 169.

8. See *id.* at 158-61.

The Commission's recommendations were embodied in extremely detailed proposed legislation.<sup>9</sup> Unfortunately, the Commission's proposed legislation was never implemented. This Article examines the current state of groundwater rights litigation,<sup>10</sup> local management of groundwater resources,<sup>11</sup> conjunctive use and groundwater storage,<sup>12</sup> and analyzes the extent to which the Commission's goals and recommendations have been implemented through means other than the Commission's proposed legislation.<sup>13</sup>

This Article concludes that many of the Commission's goals and recommendations have not been put into practice.<sup>14</sup> As a result, while California has become much more reliant on groundwater and groundwater storage, the state of groundwater law and groundwater management remains as uncertain, if not more so, than it was when the Commission's Final Report was issued.<sup>15</sup> This Article also concludes that many of the Commission's recommendations remain viable and prudent alternatives for future management of California's groundwater resources.<sup>16</sup>

## II. GROUNDWATER RIGHTS ADJUDICATIONS: ONE STEP FORWARD, TWO STEPS BACK

When the Final Report was issued, the Commission noted that "groundwater law is at a point of great uncertainty."<sup>17</sup> The Final Report was issued just three years after the California Supreme Court's lengthy decision in *City of Los Angeles v. City of San Fernando*.<sup>18</sup> Among other things, the Court's landmark decision severely limited the doctrine of mutual prescription, but left open the possibility that some form of equitable apportionment would be appropriate as part of a physical solution in future adjudications.<sup>19</sup>

Consistent with this approach, the Commission recommended that "the basis of future groundwater adjudications is fair and equitable apportionment of rights to extract groundwater, with considerable discretion to be left in the court to avoid races-to-the-pumphouse and other problems."<sup>20</sup> Although the Commission's recommendation was never adopted, the concept of "equitable apportionment" became extremely important nearly twenty years later when, in 1995, the

---

9. See *id.* at 170-250.

10. See *infra* Part II.

11. See *infra* Part III.

12. See *infra* Part IV.

13. See *infra id.*

14. See *infra* Part V.

15. See *infra id.*

16. See *infra id.*

17. FINAL REPORT, *supra* note 1, at 143.

18. 537 P.2d 1250 (Cal. 1975).

19. *Id.* at 1298-1299; FINAL REPORT, *supra* note 1, at 143.

20. FINAL REPORT, *supra* note 1, at 169.

Superior Court in Riverside County issued its decision in *City of Barstow v. City of Adelanto*,<sup>21</sup> widely known as “the *Mojave* case.” Before trial, the parties had negotiated a detailed and lengthy stipulated judgment and physical solution.<sup>22</sup> The stipulated judgment and physical solution relied heavily on principles of equitable apportionment to correct the severe overdraft in the basin and to promote the constitutional mandate of reasonable and beneficial use.<sup>23</sup>

Several parties who did not join the stipulated judgment requested a trial.<sup>24</sup> At trial, fewer than twenty parties opposed the stipulated judgment.<sup>25</sup> Following trial, the court issued a statement of decision in which the court concluded that the proposed physical solution was fair and equitable to the non-stipulating farmers.<sup>26</sup> The court noted that “[t]he strict adherence to a priority of right and a correlative right among water users of equal status, creates uncertainty and potential economic consequences for those with a lower priority of use”<sup>27</sup> and that “an equitable apportionment of water is the solution which protects the riparian, overlying and junior users’ rights to a reasonable and beneficial use of water.”<sup>28</sup> Further, the court stated that “the constitutional mandate of reasonable and beneficial use dictates an equitable apportionment of all rights when a water basin is in overdraft”<sup>29</sup> and concluded that “[h]aving found that all rights are correlative, a just and fair result is achieved by establishing a physical solution which limits each user to a proportionate equitable share of the total amount available.”<sup>30</sup>

The trial court’s decision in *Mojave* was consistent with the California Supreme Court’s reasoning in *In re Waters of Long Valley Creek Stream System*.<sup>31</sup> In *Long Valley*, the Court held that in a statutory adjudication of stream rights, an unexercised riparian right can be subordinated in favor of exercised riparian and appropriative rights.<sup>32</sup> The trial court’s decision was also consistent with comments made by the court in *Wright v. Goleta Water District*.<sup>33</sup> In that

---

21. No. 208568 (Super. Ct. Riverside County Sept. 11, 1995) (Statement of Decision) (copy on file with the *McGeorge Law Review*).

22. *City of Barstow v. City of Adelanto*, No. 208568, slip op. at 2 (Super. Ct. Riverside County Jan. 2, 1996) (Amended Statement of Decision) (copy on file with the *McGeorge Law Review*).

23. Arthur G. Kidman & Eric L. Garner, *What Now After Mojave? Are Overlying Farmers Entitled to Overdraft California Groundwater Basins, and Themselves, into Oblivion?*, 11 CAL. WATER L. & POL’Y REP. 1, 2 (Oct. 2000).

24. *City of Barstow*, No. 208568, slip op. at 2 (Amended Statement of Decision).

25. *Id.* at 11.

26. *Id.* at 13.

27. *Id.* at 8.

28. *Id.*

29. *Id.* at 9.

30. *Id.*

31. 599 P.2d 656 (Cal. 1979).

32. *Id.* at 668-669. In so holding, the court noted that uncertainty is one of the primary concerns in contemporary California water rights law. *Id.* at 666.

33. 219 Cal. Rptr. 740 (Ct. App. 1985).

case, the Court of Appeal declined to apply the principles of *Long Valley* to subordinate unexercised overlying rights in a groundwater basin, but expressed dismay over its perceived inability to do so.<sup>34</sup> The Court noted:

*Long Valley* in a riparian setting, recognized the pernicious effects of uncertainty concerning the rights of water users, including the inhibition it causes on long-range planning and investment for development and use of water, and the fostering of costly and piecemeal litigation. . . . Those same factors *should* apply with equal vigor to groundwater rights since the Legislature “has totally failed to enact a program that would fulfill the State’s own policy declarations.” . . . Like the unexercised riparian right, the unexercised groundwater right of an overlying landowner is unrecorded, of unknown quantity, with little opportunity for control in the public interest, and wasteful to the extent it deters others from using water for fear of its ultimate exercise.

Even though it may appear a logical extension of *Long Valley* to allow a trial court adjudicating competing claims to groundwater to subordinate an unexercised right to a present appropriative use, we must hold such extension inappropriate. Philosophically, we agree with District’s position but stare decisis and due process considerations, not a concern under the current riparian statutory scheme, compel us to reach the opposite conclusion in this case.<sup>35</sup>

Further, the *Wright* court acknowledged that “it is theoretically possible that judicial determination may provide complete resolution of water rights in an underground basin.”<sup>36</sup> The court also suggested that *Long Valley* principles could apply to a groundwater adjudication if a scheme for comprehensive determination of all groundwater rights, or other means of protecting due process interests of the parties whose rights would be subordinated, was in place.<sup>37</sup>

The trial court’s decision in *Mojave* was considered by many to be a victory for those favoring practical, efficient, and equitable basin management. However, the victory was short-lived. On appeal, the Court reversed the opinion and ordered the trial court to exclude one of the non-stipulating parties from the physical solution that was adopted as part of the stipulated judgment.<sup>38</sup> The California Supreme Court affirmed that decision,<sup>39</sup> and in so doing, significantly changed the legal landscape relating to groundwater adjudications. Perhaps most importantly, the Supreme Court held that equitable apportionment cannot be

---

34. *Id.* at 749.

35. *Id.* (citations omitted).

36. *Id.* at 750.

37. *Id.*

38. *City of Barstow v. Mojave Water Agency*, 75 Cal. Rptr. 2d 477, 508-509 (Ct. App. 1998).

39. *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 873 (Cal. 2000).

applied without determining the priority and amount of individual water rights.<sup>40</sup> Even in a critically overdrafted basin such as the Mojave, “a court may neither change priorities among the water rights holders nor eliminate vested rights in applying the solution without first considering them in relation to the reasonable use doctrine.”<sup>41</sup>

Moreover, the Court expressly disapproved the now-famous “footnote 61” of the Supreme Court’s opinion in *City of Los Angeles v. City of San Fernando*,<sup>42</sup> which had been used to support the doctrine of equitable apportionment.<sup>43</sup> The *Mojave* Court stated:

[O]ne could read footnote 61 in *City of San Fernando* to suggest that if prioritization of rights results in denying recent appropriative users the right to produce water, some type of equitable appropriation may be implemented in intrastate water matters. But the case is not precedent for wholly disregarding the priorities of existing water rights in favor of equitable apportionment . . . Thus, to the extent footnote 61 in *City of San Fernando* could be understood to allow a court to completely disregard California landowners’ water priorities, we disapprove it.<sup>44</sup>

The Court also noted that “an equitable physical solution must preserve water right priorities to the extent those priorities do not lead to unreasonable use.”<sup>45</sup> The Court further stated, “although it is clear that a trial court may impose a physical solution to achieve a practical allocation of water to competing interests,

---

40. *Id.* at 869.

41. *Id.* (citation omitted).

42. 537 P.2d 1250 (Cal. 1975). Footnote 61 provides as follows:

The principles by which the United States Supreme Court equitably apportions water among states are illustrated in *Nebraska v. Wyoming* (1945) 325 U.S. 589, 618 . . . . After observing that apportionment between states whose laws base water rights on priority of appropriation should primarily accord with that principle, the court said: “But if an allocation between appropriation States is to be just and equitable, strict adherence to the priority rule may not be possible. For example, the economy of a region may have been established on the basis of junior appropriations. So far as possible those established uses should be protected though strict application of the priority rule might jeopardize them. Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue. They indicate the nature of the problem of apportionment and the delicate adjustment of interests which must be made.

*Id.* at 1298 n.61.

43. *City of Barstow*, 5 P.3d at 867-868.

44. *Id.* (citations omitted).

45. *Id.* at 864.

the solution's general purpose cannot simply ignore the priority rights of the parties asserting them."<sup>46</sup>

The effect of the Court's holding is that: (1) individual water rights must be determined; and (2) the court's physical solution must be based on actual, individual rights.<sup>47</sup> The Court left open the possibility that equitable apportionment could apply in situations where the rights of all claimants are correlative, such as where mutual prescription is shown.<sup>48</sup> The Court also left open the possibility that, once overlying rights are prioritized through adjudication, a trial court can change overlying priorities and potentially eliminate vested rights after considering them in relation to the reasonable use doctrine of Article X, Section 2 of the California Constitution.<sup>49</sup>

*Mojave* clearly limited the applicability of equitable apportionment as a means of effecting a physical solution without first prioritizing individual rights. In so doing, *Mojave* also made it extremely difficult to realize the Commission's goal of reducing the length and cost of adjudications.<sup>50</sup> With the increased tension between agricultural and urban pumping, and an increased competition over an already scarce resource, it is likely that conflicts leading to adjudication will become more frequent. Because *Mojave* requires an adjudication of priorities, there is less of an incentive on the part of overlying landowners to come to the table and attempt to reach an efficient settlement. Rather, the overlying landowner has little to lose, except attorneys' fees, by insisting on a full-scale adjudication prioritizing and quantifying its prior and paramount right.

The effects of *Mojave* are apparent in an ongoing groundwater adjudication of a basin on the central coast, *Santa Maria Valley Water Conservation District v. City of Santa Maria*.<sup>51</sup> The case was filed by the Santa Maria Valley Water Conservation District in 1997 and has become a full basin adjudication involving more than one-thousand parties.<sup>52</sup> During the initial phases of trial, the court determined the boundaries of the groundwater basin.<sup>53</sup> In October 2003, the case proceeded to trial on the issue of whether the basin is, and has been, in a state of overdraft.<sup>54</sup> The *Santa Maria* case is one of the only, if not the only, case in which the overdraft issue has been tried in court rather than stipulated by the parties.

---

46. *Id.* at 869 (citation omitted).

47. *See id.*

48. *Id.* at 868.

49. *Id.* at 869; *see also* Kidman & Garner, *supra* note 23, at 3-4, 6.

50. *See* FINAL REPORT, *supra* note 1, at 169.

51. No. CV 770214 (Cal. Super. Ct. Santa Clara County).

52. Kirsten Flagg, *Water War Comes with a Hefty Price Tag*, SANTA MARIA TIMES, Aug. 13, 2004.

53. *See* Stephanie Osler Hastings, *Santa Maria Groundwater Litigation Moves to Phase II Determination*, 10 HYDROVISIONS 11 (Summer 2002), at <http://www.grac.org/Summer%20Hydrovisions.pdf> (copy on file with the *McGeorge Law Review*).

54. In Re Santa Maria Valley Groundwater Litig., No. 1-97-CV-770214, slip op. at 3 (Cal. Super. Ct. Santa Clara County May 5, 2004) (Tentative Decision Re: Phase III Trial), available at <http://www.santamariatimes.com/articles/2004/08/13/news/local/news03.prt> (last visited Aug. 13, 2004) (copy on file with the *McGeorge Law Review*).

The trial court recently issued a partial statement of decision in which it concluded that the parties did not meet the burden of proving that the basin is, or has been, in overdraft.<sup>55</sup> In making this determination, however, the court did not quantify the safe yield of the basin.<sup>56</sup> Rather, the court deferred the safe yield determination and may ultimately refer the matter to a neutral third-party expert.<sup>57</sup> The municipal suppliers in the case<sup>58</sup> took the position that the court should have quantified safe yield before determining overdraft because the California Supreme Court defines overdraft as pumping that exceeds the basin's safe yield.<sup>59</sup> In *City of Los Angeles*, the Supreme Court held that "overdraft occurs only if extractions from the basin exceed its safe yield plus any such temporary surplus."<sup>60</sup> Thus, unless safe yield is calculated, it is legally impossible to determine whether overdraft exists in a basin.<sup>61</sup>

The municipal suppliers also believe that regardless of the court's conclusion regarding overdraft, the court must now, pursuant to *Mojave*, prioritize and quantify the individual overlying rights in the basin and then measure those rights against the safe yield to determine the amount available for appropriation.<sup>62</sup> In particular, the municipal suppliers believe that, pursuant to *Mojave*, the process to quantify individual water rights should follow the method first set forth by the California Supreme Court in *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*.<sup>63</sup> Under this process, overlying landowners have the burden of proving the extent of their reasonable and beneficial use.<sup>64</sup> Once this determination is made, the court determines the safe yield of the basin and whether surplus water exists for appropriation. As explained by the Court in a later case:

[U]nder the constitutional mandate it became necessary to determine whether the riparian and overlying owners in the particular field,

---

55. *Id.* at 10.

56. *Id.* at 12.

57. *Id.* at 12-13.

58. The municipal suppliers include the City of Santa Maria, the Southern California Water Company, the Rural Water Company, and the Nipomo Community Services District. *Id.* at 2-3.

59. *See id.* at 4, 8.

60. *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1309 (Cal. 1975).

61. *In Re Santa Maria Valley Groundwater Litig.*, No. 1-97-CV-770214, slip op. at 11.

62. *Id.* at 6-7.

63. 45 P.2d 972 (Cal. 1935). The court noted that:

For the guidance of the trial court on the retrial of this case, and in future cases, the rule as to the burden of proof under the new policy [Article X, section 2] should be stated.

...

... In the present case, while it is true the burden was on appellant [the appropriator] to prove the existence of a surplus, that burden did not come into existence until after the respondent riparians [who are analogous to overlying landowners] first proved the amount required by them for reasonable beneficial purposes.

*Id.* at 991.

64. *Id.*



considering the needs of all, were putting the waters to reasonable beneficial use and whether, after a consideration of such use, there was a surplus in the water field subject to appropriation by defendant.

The logic of the holding is obvious. As the rights of the riparian and overlying landowners were limited to the amount of their actual or prospective reasonable beneficial use of the water, and the rights of the appropriators were limited by their respective appropriations, the amount to which each was entitled had to be adjudicated before it could be determined whether there was a surplus in the field subject to appropriation.<sup>65</sup>

This process was reaffirmed by the *Mojave* decision where the Court stated:

“[I]t is clear that when a riparian or overlying owner brings an action against an appropriator, it is no longer sufficient to find that the plaintiffs in such action are riparian or overlying owners, and, on the basis of such finding, issue the injunction. It is now necessary for the trial court to determine whether such owners, considering all the needs of those in the particular water field, are putting the waters to any reasonable beneficial uses, giving consideration to all factors involved, including reasonable methods of use and reasonable methods of diversion. From a consideration of such uses, the trial court must then determine whether there is a surplus in the water field subject to appropriation.” We reiterated these principles in subsequent cases, observing that although “what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved *in vacuo* isolated from statewide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment.”<sup>66</sup>

The trial court in the *Santa Maria* case has indicated that a safe yield determination is a prerequisite to effective basin management.<sup>67</sup> However, it remains to be seen whether the court will require the landowners to prove up their reasonable and beneficial use and how the court will interpret the Supreme Court’s mandate in *Mojave*.

In addition to its equitable apportionment recommendations, the Commission also recommended that adjudications be comprehensive and final determinations of water rights in a groundwater basin. To that end, the Commission recommended several modifications to the California Rules of Civil Procedure, as they apply to

---

65. *Corona Foothill Lemon Co. v. Lillibridge*, 66 P.2d 443, 447 (Cal. 1937).

66. *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 863-864 (Cal. 2000) (citations omitted).

67. *In Re Santa Maria Valley Groundwater Litig.*, No. 1-97-CV-770214, slip op. at 11-12 (Super. Ct. Santa Clara County May 5, 2004) (Tentative Decision Re: Phase III Trial) (copy on file with the *McGeorge Law Review*).

groundwater adjudications, to streamline the process for joining parties and ensuring that all parties and their successors are bound by any judgment.<sup>68</sup> In particular, the Commission suggested: (1) allocating rights to water in overdrafted basins primarily on the basis of recent use;<sup>69</sup> (2) in some circumstances, limiting the area adjudicated to a designated management area;<sup>70</sup> (3) requiring the selection of a judge outside the area to be adjudicated who is immune from a peremptory challenge under section 170.6 of the California Code of Civil Procedure;<sup>71</sup> (4) exempting groundwater adjudications from section 394 of the Code of Civil Procedure;<sup>72</sup> (5) that petitions referring an adjudication to the State Water Resources Control Board ("SWRCB") be submitted early in the action;<sup>73</sup> (6) providing for streamlined procedures for the naming of parties, including requiring utilities to furnish information needed to identify pumpers;<sup>74</sup> (7) that all claimants be required to file a proof of claim;<sup>75</sup> (8) allowing a court to issue a preliminary injunction to limit pumping in an overdrafted basin;<sup>76</sup> (9) providing for the recording of a *lis pendens*, as well as a specific provision binding parties' successors;<sup>77</sup> and (10) including provisions encouraging stipulating to judgments.<sup>78</sup>

None of these recommendations were ever enacted. As a result, the Rules of Civil Procedure remain a significant impediment to efficient and effective groundwater adjudication. In particular, a major hurdle to effective management by adjudication is determining the appropriate procedural mechanism to ensure that an adjudication is a comprehensive and final determination of groundwater rights that is binding on each party with respect to the other, as well as the parties' successors. The problem lies primarily in the fact that groundwater adjudications in California typically have not been *in rem* actions and do not run with the land. For this reason, practical considerations, such as transfer of property ownership, and legal considerations, such as limits on *res judicata*, limit the effectiveness of adjudication as a final determination of groundwater rights.

---

68. See FINAL REPORT, *supra* note 1, at 240-50.

69. *Id.* at 237.

70. *Id.* at 239.

71. *Id.* at 240.

72. *Id.* (noting that section 394 provides for a mandatory change of venue in cases involving a county, city, or local agency).

73. *Id.* at 241.

74. *Id.*

75. *Id.* at 242.

76. *Id.* at 245.

77. *Id.* at 246.

78. *Id.* at 246-48.

The doctrine of *res judicata*, as codified in section 1908 of the Code of Civil Procedure, can provide some measure of finality to groundwater adjudications. Section 1908 provides in relevant portion:

(a) The effect of a judgment or final order in an action or special proceeding before a court or judge of this state, or of the United States, having jurisdiction to pronounce the judgment or order, is as follows:

(2) In other cases, the judgment or order is, in respect to the matter directly adjudged, conclusive between the parties and their successors in interest by title subsequent to the commencement of the action or special proceeding, litigating for the same thing under the same title and in the same capacity, provided they have notice, actual or constructive, of the pendency of the action or proceeding.<sup>79</sup>

Pursuant to section 1908, principles of *res judicata* may prove an effective means to bind parties and their successors to a final judgment, but may prove troublesome in groundwater actions that are not *inter se* adjudications.<sup>80</sup>

For example, in *Pleasant Valley Canal Co. v. Borror*,<sup>81</sup> the court of appeal declined to hold that a prior decision adjudicating water rights was binding or preclusive as between the plaintiff and defendant.<sup>82</sup> The court held so because “[t]he predecessors in interest to [plaintiff] Pleasant Valley and [defendant] the Borrors did not actually litigate any issues adversely to one another in [the prior action]. Indeed, [the prior action] expressly limits its application to the water rights as between the Poplar Irrigation Company and each individual defendant [including plaintiff’s and defendant’s predecessors].”<sup>83</sup> In so holding, the court noted that, “[a]lthough the Poplar case adjudicated the rights of the Poplar Irrigation Company with respect to numerous upstream water users, there are as many other users who were not parties to the action. Moreover, the decision does

---

79. CAL. CIV. PROC. CODE § 1908(a)(2) (West 1983); see also *In Re Clark’s Estate*, 212 P. 622, 625 (Cal. 1923) (stating that the California rule is that a “judgment concludes not only the adverse party but also all those claiming under the title which he represented”); *Topanga Corp. v. Philip J. Gentile*, 33 Cal. Rptr 56, 64 (Ct. App. 1963) (stating that “[o]ne who succeeds to the interests of a party in the property or other subject of the action after its commencement is bound by the judgment with respect to those interests in the same manner as if he were a party”).

80. The term “inter se” is generally understood to mean an action in which each party’s rights are determined with respect to every other party’s rights. According to Black’s Law Dictionary, “inter se” is Latin for “between or among themselves” and is defined as a right or duty “owed between the parties rather than to others.” BLACK’S LAW DICTIONARY 825 (7th ed. 1999).

81. 72 Cal. Rptr. 2d 1 (Ct. App. 1998).

82. *Id.* at 19-20.

83. *Id.* at 19.

not purport to determine the rights of the various codefendants as among themselves.”<sup>84</sup>

*Pleasant Valley* built upon the Code of Civil Procedure and other case law regarding limitations on the use of *res judicata* to bind parties’ successors to a prior judgment. Specifically:

[W]here the plaintiff and defendant in the subsequent action were merely codefendants in the original action, the prior judgment cannot be used by one against the other as an estoppel since they were not adversary parties in the original action and no issues were raised or adjudicated *between* them therein.<sup>85</sup>

Thus, if a groundwater adjudication is to be binding on all parties (and their successors) as against one another, the adjudication and the judgment should be an *inter se* determination of each party’s right as against the other.

An alternative means to achieve finality is to record a *lis pendens* on the properties involved in the adjudication shortly after the parties are named and served. A *lis pendens* may be recorded by a party who asserts a “real property claim.”<sup>86</sup> Actions for adverse possession, among others, are considered “real property claims.”<sup>87</sup> A recorded *lis pendens* gives constructive notice of pending litigation so as to render the judgment binding on any party who subsequently acquires an interest in the property at any time after the litigation is mitigated.<sup>88</sup> A recorded *lis pendens* “effectively clouds the title to the property described in the notice and impedes or prevents a sale or encumbrance of the property until the litigation is resolved or the *lis pendens* is expunged.”<sup>89</sup> While recording a *lis pendens* may be an effective way to ensure that a judgment is binding on a party who acquires property after an adjudication has begun, recording a *lis pendens* can be costly and time consuming, especially in a large groundwater adjudication with multiple parties.

The Commission hoped court adjudications could prove to be an effective management tool if the process could be more efficient and effective. Had the Commission’s recommendations been enacted, they could have provided the basis for more effective and efficient management through adjudication. Under the current substantive and procedural requirements, however, groundwater adjudications may well be destined to become even more lengthy and expensive. In addition, after the California Supreme Court’s decision in *Mojave*, it appears that parties will be less likely to stipulate. Moreover, because groundwater adjudications are most often

---

84. *Id.* at 17.

85. *Great Western Furniture Co., Inc. v. Porter Corp.*, 48 Cal. Rptr. 76, 81 (Ct. App. 1965).

86. CAL. CIV. PROC. CODE § 405.20 (West 2004).

87. See generally W.W. Allen, Annotation, *Adverse Possession Between Cotenants*, 82 A.L.R. 2d 5 (1962); Miller & Starr, 5 CAL. REAL ESTATE § 11:136, at 345 (3d ed. 2000).

88. *Lee v. Silva*, 240 P. 1015, 1018 (Cal. 1925); Miller & Starr, *supra* note 87, at § 11:137, at 352-353.

89. Miller & Starr, *supra* note 87, at § 11:137, at 353.

reactive rather than proactive in nature, adjudications are often instituted after basin conditions have deteriorated substantially and extensive remediation efforts are required. If parties to a groundwater adjudication can reach a stipulated judgment, such judgments may provide increased flexibility and may promote viable management alternatives, such as provisions for the conversion and/or transferability of rights.

Unfortunately, adjudication may be the only management tool in some areas. Although references to the SWRCB, pursuant to Water Code section 2000, remain a viable option, the reference procedure is lengthy and the SWRCB currently suffers from severe staffing limitations. Furthermore, a party dissatisfied with the SWRCB's decision may file exceptions to it with the court and effectively have a *de novo* trial court review.<sup>90</sup>

### III. LOCAL MANAGEMENT: AD HOC AND INCOMPLETE

At the time the Final Report was written, there were no state-level groundwater management programs.<sup>91</sup> Instead, the Commission noted that:

Groundwater management has occurred solely on an ad hoc basis at the local level, in response to local initiative . . . The success of local management programs shows that locally conceived and controlled groundwater management programs can be adequate and that state-level management is neither essential nor necessarily desirable where effective local programs are undertaken. Local management is also appropriate in view of the varied physical characteristics of basins throughout the State.<sup>92</sup>

The Commission recommended that local agencies control groundwater transfers and be given a wide range of powers related to the management of local groundwater resources.<sup>93</sup> The Commission cited Orange County Water District as a successful example of the non-adjudication approach to groundwater management<sup>94</sup> and expressed optimism regarding "a significant number of highly sophisticated, successful, local management programs already in existence in several areas of the State."<sup>95</sup> The Commission also recommended legislation that would allow for flexibility in terms of management, but would "require the continued existence of strong local entities, fully capable of actively managing these valuable resources."<sup>96</sup> The Commission further recommended legislation

---

90. CAL. WATER CODE § 2000 (West 1971).

91. FINAL REPORT, *supra* note 1, at 145.

92. *Id.* at 145-46.

93. *Id.* at 166-67.

94. *Id.* at 146.

95. *Id.* at 166.

96. *Id.*

providing for local control of groundwater transfers, including the “power to control the export of groundwater from the groundwater management area by means of a license requirement.”<sup>97</sup> Under the Commission’s proposal, the local groundwater management authority, rather than the appropriator, would control groundwater export.<sup>98</sup>

Although the Commission’s proposed legislation was not enacted, other legislation has been enacted granting local authorities control over local groundwater resources and facilitating the transfer of both surface water and groundwater beyond the boundaries of historical water service areas.

The most notable and wide-ranging example of legislation supporting local management of groundwater resources is Water Code sections 10750 to 10755.4, which were enacted by Assembly Bill 3030 in 1992 and provides broad authority for local agencies to adopt groundwater management plans.<sup>99</sup> Currently, more than two-hundred agencies have adopted some form of groundwater management plan under the authority of these provisions.<sup>100</sup>

As noted in Department of Water Resources (“DWR”) publications, there are several examples of successful local management efforts under these Water Code provisions.<sup>101</sup> Some groundwater management plans are extremely detailed. For example, the plan may contain provisions for:

- (1) the control of saline water intrusion
- (2) regulation of the migration of contaminated groundwater
- (3) the administration and management of wellhead protection and well destruction programs
- (4) mitigation of conditions of overdraft
- (5) replenishment of groundwater extraction by water producers
- (6) monitoring of groundwater levels and storage
- (7) facilitating conjunctive use operations
- (8) the construction and operation by the local agency of groundwater contamination cleanup, recharge, storage, conservation, water recycling, and extraction projects
- (9) the development of relationships with state and federal regulatory agencies
- and (10) the review of land use plans and coordination with land use planning agencies to assess activities which create a reasonable risk of groundwater contamination.<sup>102</sup>

---

97. *Id.* at 167.

98. *Id.*

99. See AB 3030, 1992 Cal. Stat. ch. 947 (enacting the Groundwater Management Act codified at CAL. WATER CODE §§10750-10755.4 (West Supp. 2004)).

100. DEP’T OF WATER RES., CALIFORNIA’S GROUNDWATER UPDATE 2003, at 33, 44 (Bulletin 118) [hereinafter DWR BULLETIN 118].

101. *Id.* at 44-47 (providing examples of local agency successes).

102. STATE WATER RES. CONTROL BD., A GUIDE TO WATER TRANSFERS, DRAFT 7-1 (July 1999) [hereinafter GUIDE TO WATER TRANSFERS].

However, groundwater management plans are optional, and some local agencies have expressed no interest in developing such plans.<sup>103</sup> Other local agencies have enacted groundwater management plans but have made no effort to implement those plans.<sup>104</sup> Plans vary widely in terms of detail and structure, and not all plans focus on long-term management solutions.<sup>105</sup> Moreover, local agencies need not submit their groundwater management plans to DWR, so it is difficult to monitor or assess the relative success of local plans on a statewide level.<sup>106</sup>

Another complicating factor is that many groundwater basins contain a number of agencies with different regulatory or statutory authority.<sup>107</sup> In addition to the fact that water management programs may differ from agency to agency, there is no clear nexus between plans adopted by certain water agencies and ordinances adopted by overlapping or adjacent cities and counties.<sup>108</sup> Lastly, because the State does not administratively oversee groundwater extractions, local water users who believe Water Code sections are being violated must seek redress in the courts.<sup>109</sup>

Another manner in which local agencies control groundwater resources, particularly groundwater transfers, is through local groundwater ordinances. Local groundwater management ordinances have been adopted in at least twenty-seven counties.<sup>110</sup> According to DWR, “[m]ost county groundwater management ordinances require that an export proponent prove the project will not deplete groundwater, cause groundwater quality degradation, or result in land subsidence.”<sup>111</sup> However, the ordinances do not require the development and implementation of a basin management plan.<sup>112</sup> Only the Glenn County ordinance, as amended in 2000, requires the development of objectives through basin management.<sup>113</sup> In contrast, twenty-two of these county ordinances require

---

103. DEP'T OF WATER RES., GROUNDWATER MANAGEMENT IN CALIFORNIA: A REPORT TO THE LEGISLATURE PURSUANT TO SENATE BILL 1245 (1997), at 20 (1999) (listing the agencies that have no interest in developing local groundwater management plans) [hereinafter GROUNDWATER MANAGEMENT IN CALIFORNIA].

104. *Id.* at IX; DWR BULLETIN 118, *supra* note 101, at 44.

105. DWR BULLETIN 118, *supra* note 101, at 44.

106. *Id.*

107. GROUNDWATER MANAGEMENT IN CALIFORNIA, *supra* note 103, at IX.

108. *Id.*

109. GUIDE TO WATER TRANSFERS, *supra* note 102, at 7-5.

110. DWR BULLETIN 118, *supra* note 100, at 36. The counties and the year the ordinances were enacted are as follows: Butte (1996), Calaveras (2002), Colusa (1998), Fresno (2000), Glenn (1990, rev. 2000), Imperial (1996), Inyo (1998), Kern (1998), Lake (1999), Lassen (1999), Madera (1999), Mendocino (1995), Modoc (2000), Mono (1988), Monterey (1993), Napa (1996), Sacramento (1952, rev. 1985), San Benito (1995), San Bernardino (2002), San Diego (1991), San Joaquin (1996), Shasta (1997), Sierra (1998), Siskiyou (1998), Tehama (1992), Tuolumne (2001), Yolo (1996). *Id.* at 39.

111. *Id.* at 38.

112. *Id.*

113. *Id.*

a permit to export groundwater.<sup>114</sup> Restricting out-of-county uses appears to be the sole purpose of the permit requirement in nineteen of the twenty-two counties requiring a permit.<sup>115</sup> It is the opinion of DWR that “[l]ocal ordinances passed during the 1990s have significantly increased the potential role of local governments in groundwater management,” but that “[b]ecause adoption of most of these ordinances is recent, their effect on local and regional groundwater management planning efforts is not yet fully known.”<sup>116</sup>

#### IV. CONJUNCTIVE USE AND GROUNDWATER STORAGE SPACE: HOPE FOR THE FUTURE

The Commission recommended that local authorities have primary control over the use of groundwater storage space and that conjunctive use of groundwater and surface water be encouraged.<sup>117</sup> In this area, perhaps more than any other, the Commission’s goals have been realized. Conjunctive use has increased dramatically in the last twenty-five years. Water Code section 1011.5 describes a statewide policy of encouraging conjunctive use and authorizes the conjunctive use of surface and groundwater.<sup>118</sup> Similarly, Water Code sections

---

114. *Id.* at 36.

115. *Id.*

116. *Id.* at 36.

117. FINAL REPORT, *supra* note 1, at 171.

118. CAL. WATER CODE § 1011.5 (West Supp. 2004). Section 1011.5 provides as follows:  
§ 1011.5. Conjunctive use of surface water and groundwater supplies; availability of surface water for other beneficial uses

(a) The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water. The Legislature further declares that it is the policy of this state to encourage conjunctive use of surface water and groundwater supplies and to make surface water available for other beneficial uses. The Legislature recognizes that the substantial investments that may be necessary to implement and maintain a conjunctive use program require certainty in the continued right to the use of alternate water supplies.

(b) When any holder of an appropriative right fails to use all or any part of the water as a result of conjunctive use of surface water and groundwater involving the substitution of an alternate supply for the unused portion of the surface water, any cessation of, or reduction in, the use of the appropriated water shall be deemed equivalent to a reasonable and beneficial use of water to the extent of the cessation of, or reduction in, use, and to the same extent as the appropriated water was put to reasonable and beneficial use by that person. No forfeiture of the appropriative right to the water for which an alternate supply is substituted shall occur upon the lapse of the forfeiture period applicable to water appropriated pursuant to the Water Commission Act or this code or the forfeiture period applicable to water appropriated prior to December 19, 1914.

The state board may require any holder of an appropriative right who seeks the benefit of this section to file periodic reports describing the extent and amount of the reduction in water use due to substitution of an alternate supply. To the maximum extent possible, the reports shall be made a part of other reports required by the state board relating to the use of water. Failure to file the reports shall deprive the user of water of the benefits of this section.

(c) Substitution of an alternate supply may be made only if the extraction of the alternate supply conforms to all requirements imposed pursuant to an adjudication of the groundwater



1005.1, 1005.2, and 1005.4 specifically provide protection of groundwater rights while the holder of those rights ceases or reduces the use of groundwater to use a nontributary alternate source of water or to allow the replenishment of groundwater.<sup>119</sup>

---

basin, if applicable, and meets one of the following conditions:

(1) Except as specified in paragraph (2), is from a groundwater basin for which the operating safe yield is not exceeded prior to the extraction of the alternate supply and does not cause the operating safe yield of the groundwater basin from which the alternate supply is obtained to be exceeded.

(2) Is from the Eastern San Joaquin County Basin, as described on pages 38 and 39 of the Department of Water Resources Bulletin No. 118-80, for which the operating safe yield is exceeded prior to the extraction of the alternative supply, if all of the following requirements are met:

(A) The conjunctive use program is operated in accordance with a local groundwater management program that complies with the requirements of this section.

(B) The groundwater management program establishes requirements for the extraction of groundwater and is approved by a joint powers authority that meets the requirements of subparagraph (C).

(C) The joint powers authority includes one or more of the water agencies overlying the contemplated points of groundwater extraction and one or more of the water agencies that will share in the benefits to be derived from the local groundwater management program.

(D) By either of the following methods, the overdraft of the groundwater basin underlying the point of extraction has been reduced prior to the commencement of extraction:

(i) Elimination of a volume of existing groundwater extractions in excess of the proposed new extraction.

(ii) Recharge of the groundwater basin with a volume of water in excess of the proposed new extraction.

(E) The operation of that conjunctive use program ensures that the overdraft of the groundwater basin continues to be reduced.

(d) Water, or the right to the use of water, the use of which has ceased or been reduced as the result of conjunctive use of surface water and groundwater involving substitution of an alternate supply, as described in subdivisions (b) and (c), may be sold, leased, exchanged, or otherwise transferred pursuant to any provision of law relating to the transfer of water or water rights, including, but not limited to, provisions of law governing any change in point of diversion, place of use, and purpose of use due to the transfer.

(e) As used in this section, "substitution of an alternate supply" means replacement of water diverted under an appropriative right by the substitution of an equivalent amount of groundwater.

(f) This section does not apply to the Santa Ana River watershed.

(g) This section does not apply in any area where groundwater pumping causes, or threatens to cause, a violation of water quality objectives or an unreasonable effect on beneficial uses established in a water quality control plan adopted or approved by the state board pursuant to, and to the extent authorized by, Section 13170 or 13245, which designates areas where groundwater pumping causes, or threatens to cause, a violation of water quality objectives or an unreasonable effect on beneficial uses.

(h) This section shall not be construed to increase or decrease the jurisdiction of the state board over groundwater resources, or to confer on the state board jurisdiction over groundwater basins over which it does not have jurisdiction pursuant to other provisions of law.

*Id.*

119. *Id.* §§ 1005.1, 1005.2, 1005.4 (West 1971 & Supp. 2004). Section 1005.1 provides in relevant portion: § 1005.1. Ground water; cessation or reduction in extraction; alternate supply; reasonable beneficial use; statement of amount used; definitions

Cessation of or reduction in the extraction of ground water by the owner of a right to extract, as the result of the use of an alternate supply of water from a nontributary source, shall be and is deemed equivalent to, and for purposes of establishing and maintaining any right to extract the ground water shall be construed to constitute, a reasonable beneficial use of the ground water to the extent and in the amount that water from the alternate source is applied to reasonable beneficial use, not exceeding, however, the amount of such reduction. Any such user of water from an alternate nontributary source who seeks the benefit of this section, shall file with the board, on or before December 31st of each calendar year, a statement of the amount of water from such source so applied to reasonable beneficial use pursuant to the provisions of this section during the next preceding water year (November 1st to October 31st), and such user cannot claim the benefit of this section for any water year for which such statement is not so filed.

*Id.* § 1005.1.

Water Code section 1005.2 provides in relevant portion:

§ 1005.2. Ground water; replenishment by use of alternate supply; reasonable beneficial use; filing of statement

Cessation of or reduction in the extraction of ground water, to permit the replenishment of such ground water by the use of water from an alternate nontributary source, is hereby declared to be a reasonable beneficial use of the ground water to the extent and in the amount that water from such alternate source is applied to beneficial use, not exceeding, however, the amount of such reduction. No lapse, reduction or loss of any right in ground water, shall occur under such conditions. Any such user of water from an alternate source who seeks the benefit of this Section 1005.2 with respect to the use of such water occurring prior to the effective date of this section, shall file with the board, within ninety (90) days from said effective date, a statement of the amounts of reduction in the extraction of ground water as the result of water from said alternate source having been so applied to reasonable beneficial use prior to said effective date to permit the replenishment of such ground water and said amounts shall be segregated and shown for each water year (November 1st to October 31st) during which such use occurred prior to the effective date of this section. Any such user of water from an alternate source who seeks the benefit of this Section 1005.2 with respect to the use of such water occurring subsequent to the effective date of this section, shall file with the board, on or before December 31st of each calendar year, a statement of the amount of reduction in the extraction of ground water as the result of water from said alternate source having been so applied to reasonable beneficial use during the next preceding water year (November 1st to October 31st) to permit the replenishment of such ground water. Such user cannot claim the benefit of this section for any water year for which such statement is not so filed.

The provisions of this section apply only as to the cessation of, or reduction in, the extraction of ground water within that area in this state defined by the exterior boundaries of the Counties of San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, San Diego, Imperial, Riverside, and San Bernardino.

*Id.* § 1005.2.

Section 1005.4 of the Water Code provides in relevant portion:

§ 1005.4. Ground water; cessation or reduction in extraction; alternate nontributary source; reasonable beneficial use; statement of reduction amount; applicability; definitions

(a) Cessation of or reduction in the extraction of ground water, to permit the replenishment of such ground water by the use of water from an alternate nontributary source, is hereby declared to be a reasonable beneficial use of the ground water to the extent and in the amount that water from such alternate source is applied to beneficial use, not exceeding, however, the amount of such reduction. No lapse, reduction or loss of any right in ground water, shall occur under such conditions.

(b) Any such user of water from an alternative source may file with the board, on or before December 31st of each calendar year, a statement of the amount of reduction in the extraction of groundwater as a result of water from the alternative source having been so applied to reasonable beneficial use during the next preceding water year (October 1st to September 30th) to permit replenishment of such groundwater. However, failure to file such

In addition, during the last several years, DWR, through its Conjunctive Water Management Program, has implemented programs designed to facilitate conjunctive use projects.<sup>120</sup> The recently enacted Proposition 13 authorizes \$200 million for the study, design, and construction of conjunctive use facilities.<sup>121</sup> DWR recently reported that it has awarded more than \$170 million of Proposition 13 funds for projects throughout the state.<sup>122</sup>

Other noteworthy conjunctive use projects include the Kern County Water Bank, a State Water Project groundwater banking program, and the Semitropic Water Storage District, which is part of the Metropolitan Water District's Integrated Resources Plan.<sup>123</sup> The Semitropic Water Storage District will allow cyclic storage and withdrawal of approximately 350,000 acre-feet of water.<sup>124</sup>

Collectively, these and other programs have significantly increased both the reliability of California's water supply and the flexibility necessary to manage groundwater resources. As noted by DWR, "[c]oordinated management of groundwater and surface water resources, through further development of conjunctive water management programs and projects, will become increasingly important."<sup>125</sup>

It remains to be seen what effect, if any, the recent *Northern Plains Resource Council v. Fidelity Exploration and Development Company*<sup>126</sup> and *South Florida Water Management District v. Miccosukee Tribe of Indians*<sup>127</sup> cases will have on the ability to develop successful conjunctive use programs and other types of water transfers. The U.S. Supreme Court recently remanded the *Miccosukee* case to the Eleventh Circuit to consider whether water transferred from one navigable waterway to another is subject to the National Pollutant Discharge Elimination System ("NPDES") requirement of the Clean Water Act.<sup>128</sup> The Ninth Circuit, in the *Northern Plains* case, recently relied on the original Eleventh Circuit *Miccosukee* opinion<sup>129</sup> to hold that unaltered groundwater discharged into a river

---

a statement shall in no way affect the right of a user to claim the benefit of this section.

(c) The provisions of this section apply only as to the cessation of, or reduction in, the extraction of ground water within that area in this state defined by the exterior boundaries of every county, except the Counties of San Luis Obispo, Santa Barbara, Ventura, Los Angeles, Orange, San Diego, Imperial, Riverside, and San Bernardino.

*Id.* § 1005.4 (West Supp. 2004).

120. DWR BULLETIN 118, *supra* note 100, at 72.

121. *Id.* at 66.

122. *Id.* at 73.

123. METRO. WATER DISTRICT OF SOUTHERN CALIFORNIA, *Snapshots of the Past ... Portrait of a New Reality: Achievements in Conservation, Recycling and Groundwater Recharge*, at [http://www.mwdh2o.com/mwdh2o/pdf/ywater/SB60\\_04.pdf](http://www.mwdh2o.com/mwdh2o/pdf/ywater/SB60_04.pdf) (Feb. 2004) (copy on file with the *McGeorge Law Review*).

124. *Id.* at 28.

125. DWR BULLETIN 118, *supra* note 100, at 49.

126. 325 F.3d 1155 (9th Cir. 2003).

127. 541 U.S. 95 (2004).

128. *Id.* at 111-12.

129. See *Miccosukee Tribe of Indians of Fla. v. S. Fla. Water Mgmt. Dist.*, 280 F.3d 1364 (11th Cir. 2002).

was a “pollutant” within the meaning of the Clean Water Act.<sup>130</sup> If the Court ultimately decides that a NPDES permit is required in situations such as these, it could have a significant effect on future water transfers.

Another issue targeted by the Commission that has become increasingly important is the role of groundwater storage space as part of the management of groundwater resources. Recently, the Court of Appeal issued an opinion regarding storage space in the Central Basin.<sup>131</sup> In that case, nearly 150 entities with adjudicated rights to pump water in the Central Basin filed a motion to quantify and allocate the entities’ rights to use storage space available in the basin.<sup>132</sup> Specifically, the motion sought to divide the total usable storage space among the entities in direct proportion to each entity’s annual pumping allocation.<sup>133</sup> The Water Replenishment District of Southern California (“WRD”) opposed the motion, arguing that the “proposed allocation interfered with its statutory powers and that the unused storage space is a public resource.”<sup>134</sup> The Court of Appeal upheld the trial court’s denial of the motion, concluding that the right to extract water from the basin does not create a right to store water in the basin.<sup>135</sup> In so holding, the court noted that “[e]xtraction and storage are different physical processes; establishing a hydrologic link between them is not sufficient to show that a legal interest in one creates an interest in the other.”<sup>136</sup> Moreover, the court noted that the motion, which sought to allocate the total usable storage space, failed “to ensure that the storage space will be used for the public benefit.”<sup>137</sup>

An important factor in the court’s decision was the WRD, which was specifically authorized to manage storage space in the Central Basin.<sup>138</sup> Allocating the total usable storage space to entities other than the WRD arguably would have interfered with the WRD’s legislative authority to manage the storage space.<sup>139</sup> However, the decision is consistent with the policy of other California water law decisions. For example, in 2000, the Court of Appeal confirmed that “there is no private ownership of ground or flowing water”<sup>140</sup> and that water rights are usufructory in nature.<sup>141</sup> Thus, there is no right of ownership over the corpus of the water.<sup>142</sup>

---

130. *Northern Plains*, 325 F.3d at 1162 (holding that the Clean Water Act “does not require that the discharged water be altered by man . . . because the goal of the [Clean Water Act] is to protect receiving waters, not to police the alteration of the discharged water”) (citation omitted).

131. *See Cent. & W. Basin Water Replenishment Dist. v. S. Cal. Water Co.*, 135 Cal. Rptr. 2d 486 (Ct. App. 2003).

132. *Id.* at 492.

133. *Id.*

134. *Id.* at 493.

135. *Id.* at 505.

136. *Id.* at 500.

137. *Id.* at 502.

138. *Id.* at 503-04.

139. *See id.*

140. *State of Cal. v. Superior Ct.*, 93 Cal. Rptr. 2d 276, 280 (Ct. App. 2000).

141. *Id.* at 284-285.

142. *Id.* at 286-287.

The management of groundwater storage space is still an uncertain issue, with claims pending in Santa Maria and the inverse condemnation claims brought by landowners dismissed.

## V. NEXT STEPS IN GROUNDWATER MANAGEMENT

Unfortunately, the management of California's groundwater resources is more uncertain than ever. The Commission's recommendation that California establish a "strong policy of groundwater resources protection"<sup>143</sup> remains a good one and is essential to any comprehensive legislative or management scheme. The Commission felt that this policy could be implemented on a local level, noting that "[t]here are a significant number of highly sophisticated, successful, local management programs already in existence,"<sup>144</sup> and acknowledging that "[s]uccessful implementation of the Commission's proposals will require the continued existence of strong local entities."<sup>145</sup> As detailed above, the Legislature has responded by establishing several mechanisms by which local agencies can develop groundwater management programs.<sup>146</sup>

Although some programs have been successful, local management tools established thus far are not mandatory and do not promote consistency or cooperation between local agencies. In order for management on the local level to work on a long-term basis, the Legislature should consider requiring local agencies to implement a groundwater management plan or other management tools that meet specified, legislatively-mandated criteria. Moreover, the Legislature should require local agencies to lodge the reports with DWR and provide periodic updates or other information that would assist DWR in monitoring local plans on a statewide basis. The plans should be proactive in nature and apply equally to areas that are not facing critical overdraft or other problems, so these problems can be avoided in the future. In addition, in order to avoid potential overlapping authority and related issues, the Legislature should consider designating groundwater management areas with centralized authority.

With respect to groundwater adjudications, the Legislature should consider establishing a water court or similar tribunal that would specialize in water rights disputes. This process has met with some success in other Western states, such as Colorado.<sup>147</sup> Recently, the New Mexico Supreme Court ordered each of the state's district courts to appoint a judge to handle water rights adjudications.<sup>148</sup> In

---

143. FINAL REPORT, *supra* note 1, at 166.

144. *Id.*

145. *Id.*

146. *See supra* Part III.

147. Colorado Ground Water Management Act, COLO. REV. STAT. ANN. § 37-90-101 to 37-90-143 (West 2004); *see also* Eagle Peak Farms, Ltd. v. Colo. Groundwater Comm'n, 870 P.2d 539 (1993).

148. *New Mexico to Establish Water Rights Courts*, N.M. BUS. WEEKLY, Jan. 29, 2004, *available at* <http://albuquerque.bizjournals.com/albuquerque/stories/2004/01/26/daily18.html> (last visited Mar. 21, 2005) (copy on file with the *McGeorge Law Review*).

addition, as suggested by the Commission, the Rules of Civil Procedure should be streamlined and modified to promote efficient, cost-effective adjudications.<sup>149</sup>

Attempts by the SWRCB to expand its regulatory authority over groundwater have been met with controversy. In 1999, the SWRCB issued a draft decision that would have reclassified the groundwater within the Pauma and Pala Basins as subterranean streams subject to SWRCB jurisdiction.<sup>150</sup> The SWRCB received numerous protests and, in response, retained Professor Joseph L. Sax to address the issues raised in the "Pauma and Pala" proceedings and to provide recommendations to the SWRCB. Professor Sax issued his report on January 19, 2002. Among other things, he recommended that groundwater management efforts should not focus on legislation "to enlarge the Board's permitting jurisdiction over what is now called percolating groundwater."<sup>151</sup> The report goes on to describe several problems with expanding the permit system to groundwater.<sup>152</sup> In light of the Pauma and Pala controversy, and the Sax Report, any statewide regulation of groundwater is extremely unlikely.

---

149. See FINAL REPORT, *supra* note 1, at 169.

150. JOSEPH L. SAX, REVIEW OF THE LAWS ESTABLISHING THE SWRCB'S PERMITTING AUTHORITY OVER APPROPRIATIONS OF GROUNDWATER CLASSIFIED AS SUBTERRANEAN STREAMS AND THE SWRCB'S IMPLEMENTATION OF THOSE LAWS, FINAL REPORT 53-54 (Jan. 19, 2002).

151. *Id.* at 10.

152. *Id.* at 90-92.

\* \* \*